

STATE OF MICHIGAN
COURT OF APPEALS

TINA MARIE WILLIAMS,

Plaintiff-Appellee,

v

SHANE HUBBARD,

Defendant-Appellant.

UNPUBLISHED

March 21, 2006

No. 262865

Chippewa Circuit Court

LC No. 97-002936-DC

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant father appeals by leave granted from the trial court's order granting plaintiff mother's petition to change the parties' minor child's domicile from Michigan to Florida. We affirm.

The parties' daughter was born on May 17, 1996. The parties never married, but lived together until their daughter was a little over a year old. In July, 1997, the trial court entered an ex parte order granting joint legal custody, physical custody to plaintiff, and allowing reasonable visitation. Three years later, in July 2000, pursuant to an agreed-upon resolution of defendant's April, 1999 motion to for custody, the court ordered that the parties have joint legal custody; that defendant have physical custody during the summer break, alternate weekends and one weeknight following the alternate weekend during the school year, alternate holidays, including the child's birthday, and every Fathers' Day weekend; and that plaintiff have physical custody alternate weekends and one weekday following the alternate weekend during the summer, every Mother's Day weekend, and all other times not awarded to defendant. This order was modified in 2003, to provide that weekend parenting time would run from 5 pm Friday to 5pm Sunday, that weekday parenting time would be on Wednesday from 3 pm to 8 pm, that summer-block parenting time would run from June 15 to August 15, and that the parties would alternate Christmas and Spring breaks.

Plaintiff married¹ and her husband, a member of the Air Force military police, was transferred to Florida. Plaintiff filed a motion to change the child's domicile from Michigan to

¹ Defendant also married.

Florida, and defendant filed a motion for change of custody.² After a hearing, the court granted plaintiff's motion to change the child's domicile. The court ordered the following custodial arrangement: defendant is to have custody of the child every spring, summer, and Christmas break, and any other time he chooses, so long as it does not interfere with the child's school or previously made plans. Plaintiff must notify defendant if she will be in Michigan, and defendant will have additional custodial time during such periods. Plaintiff is to have custody at all other times. The court found that it did not need to address a change in custody because the parties still had joint custody although the custody schedule had changed.

Defendant argues that the trial court erred in granting plaintiff's motion for a change in domicile, asserting that the court erroneously applied the factors set forth in MCL 722.31. We disagree.

Where the parties share joint physical custody and one parent is seeking permission to relocate more than 100 miles away, the trial court must review the factors set forth in MCL 722.31. *Brown v Loveman*, 260 Mich App 576, 598 n 7; 680 NW2d 432 (2004). "The moving party has the burden of establishing by a preponderance of the evidence that the change in domicile is warranted." *Mogle v Scriver*, 241 Mich App 192, 203; 614 NW2d 696 (2000). If the court grants the petition to change the child's domicile, the court must determine whether the modified custody arrangement amounts to a change in the established custodial environment, as set forth in MCL 722.27. *Brown, supra* at 595. If the court finds that "the relocation would result in a change in parenting time so great as to necessarily change the established custodial environment[.]" then the court must conduct an inquiry into the best interest factors set forth in MCL 722.23. *Id.* at 594-595, 598 n 7. The moving party would then have to prove by clear and convincing evidence that the change in domicile effecting the established custodial environment would be in the child's best interest. *Id.*

MCL 722.31 states in relevant part:

(1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

* * *

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

² Prior to this motion, plaintiff had filed two motions to change domicile. One was dismissed and the other was denied.

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

With regard to the first factor, the court found that defendant married and has two other children, and that plaintiff married and has one other child. The court also found that although each party would be able to provide the child with a home, school, and basic necessities, the change in domicile would improve the quality of life for both the child and plaintiff because had plaintiff not moved, her husband would have been unemployed.

In cases involving a petition to change a minor child's domicile, one of the reasons commonly given for the move is better employment opportunities for either the relocating parent or the relocating parent's spouse. See, e.g., *Mogle, supra* (mother petitioned for a change in the minor child's domicile because her husband was enlisted in the Air Force and was assigned to a base in Virginia). In this case, plaintiff testified that her husband was in the Air Force military police and was stationed in Florida. Plaintiff also testified that there was no military base in Chippewa County. Therefore, plaintiff's move from Michigan to Florida would substantially increase plaintiff's family's income because plaintiff's husband had established employment in Florida, whereas no similar employment opportunity existed in Michigan. This "Court has held that a substantial increase in income that will elevate the quality of life of the relocating parent and child supports a finding that a party has met its burden of proof" under MCL 722.31(4)(a). *Brown, supra* at 601. "Moreover, the burden of proof by a preponderance of the evidence 'recognizes the increasingly legitimate mobility of our society.'" *Id.*, 601-602, quoting *Henry v Henry*, 119 Mich App 319, 324; 326 NW2d 497 (1982). We reject defendant's argument that consideration of factor one as it relates to employment may focus only on the relocating parent, and not on the parent's spouse. There is no basis on which to impose such an artificial limitation where the relocating parent has established a new family unit of which the child is a part. Accordingly, the trial court's findings of fact are not against the great weight of the evidence.

With regard to the second factor, the trial court found that each parent took available opportunities to spend time with the child and that there was no indication plaintiff's request to move the child's legal residence was an attempt to defeat defendant's custody time. Both parties acknowledged that the other party took advantage of every opportunity to spend time with the child and that their custody schedule had worked fairly comfortably. Therefore, the trial court's findings of fact on this factor were not against the great weight of the evidence.

With regard to the third factor, the trial court adopted a custodial arrangement that provides defendant with custody of the child every spring, summer, and Christmas break,³ and any other time he chooses so long as it does not interfere with the child's school or previously made plans. Plaintiff is to have custody of the child at all other times. As the trial court noted, the custody arrangements that existed prior to and after the change in domicile were essentially the same, except that defendant will no longer have physical custody during the school year on alternate weekends and one weeknight following the alternate weekend. Instead, defendant will have physical custody every Christmas and spring break, and will have custody for a longer period during the summer and without plaintiff having weekend and alternate weekday custody.

Although the amount of time defendant will have with the child following the change of domicile will not be identical to the amount of time he shared with the child before the change, "[i]t has been noted that to satisfy the fourth . . . factor⁴, 'one must start with the premise that implicit in this factor is an acknowledgement that weekly visitation is not possible when parents are separated by state borders.'" *Brown, supra* at 603, quoting *Costantini v Costantini*, 446 Mich 870, 873; 521 NW2d 1 (1994) (Riley, J., concurring). "Under the fourth factor, the new visitation plan need not be equal to the prior visitation plan in all respects. It only need provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed by the noncustodial parent." *Mogle, supra* at 204. The new schedule satisfies this requirement. See *Scott v Scott*, 124 Mich App 448, 452-453; 335 NW2d 68 (1983). Accordingly, the trial court's finding in this regard was not against the great weight of the evidence.

With regard to the fourth factor, the court did not believe defendant's opposition to the petition to change the child's domicile was an attempt to gain a financial advantage. Neither party appears to dispute this finding. Therefore, the trial court's finding was not against the great weight of the evidence. Similarly with regard to the fifth and final factor, the court found there was no domestic violence involved in this situation. Neither party alleged any domestic violence, and therefore the trial court's finding of fact was not against the great weight of the evidence.

³ Although plaintiff proposed that the parties alternate Christmas vacation, the court ordered that defendant have custody every Christmas vacation.

⁴ All references in this paragraph to the "fourth factor" refer to the third factor under the current statutory scheme, MCL 722.31(4)(c).

Thus, only the first and third factors are relevant to the current facts. Plaintiff has satisfied her burden of proof with regard to both of these factors. Accordingly, the trial court did not abuse its discretion in granting plaintiff's petition to change the child's domicile.⁵

Affirmed.

/s/ William B. Murphy

/s/ Helene N. White

/s/ Patrick M. Meter

⁵ While defendant's statement of facts and prayer for relief include references to the court's failure to hear his pending motion for change of custody, any error in that regard was not raised in his statement of questions presented on appeal, and we do not address it. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).